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NO. 83-2128

In the
Supreme Court of the United States

OCTOBER TERM, 1983

REYNARD JOHN ROCHON, SR.,

PETITIONER

VERSUS

DENNIS WOLTER, JIM BOYER, WWL-TV, CHANNEL 4, LOYOLA UNIVERSITY AND UNKNOWN INSURANCE COMPANY,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a libel case involving federal First Amendment protections for a broadcast—medium defendant, who has moved in virtual simultaneity for both orders to quash all discovery by the plaintiff and for a summary judgment, whether the proper balance between the First Amendment rights of defendant and the due process right and reputational interest of the plaintiff requires, as the Louisiana Courts held:

(a) That plaintiff denied all discovery, should nevertheless actually *prove* falsity and actual malice in his opposition to the motion for summary judgment; or whether plaintiff may defeat the motion by making out a *prima facie* case, showing with convincing clarity that there is a genuine factual issue as to falsity and actual malice and that proof at trial of plaintiff's version of the disputed facts will entitle plaintiff to relief as a matter of law?

(b) That a state court refrain from applying a state qualified reportial privilege statute (La. R.S. 45:1452, 1454) so as to require the defendants, who claimed the conditional reporter's privilege as to "confidential sources" upon whom they relied, to bear the statutorialy-shifted burden of proving the intermediate fact that such source existed and was not inherently unreliable under the circumstances; or whether the First Amendment permits a state court to apply such a statute?

(c) That a state court truncate the record upon which the motion for summary judgment is determined, by quashing discovery on the grounds of its alleged "chilling effect"; or whether the First Amendment permits a plaintiff to have reasonable *Herbert v. Lando* discovery into the

conduct, state of mind, and editorial processes of defendants (actual malice factors), where he makes a *prima facie* preliminary showing of falsity?

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REFERENCE TO CASE AS REPORTED BELOW

Two decisions of the Louisiana appellate courts in this case have been reported, at 427 So.2d 495 (La. App. 4th Cir. 1983), writs denied, 430 So.2d 70 (La. 1983); the remaining two appellate decisions and the decisions of the Civil District Court for the Parish of Orleans, State of Louisiana, have not been reported. (See Appendix.)

STATEMENT OF JURISDICTION

On March 16, 1984, the Supreme Court of Louisiana issued an order denying plaintiff's petition for writs of certiorari to review an order of the Louisiana Court of Appeal, Fourth Circuit, dismissing plaintiff's appeal from summary judgment.

The jurisdiction of this Court is founded upon 28 U.S.C. 1257(3), in that 1) the Louisiana Statutes conferring discovery rights on plaintiff and shifting the burden of proof, to a limited extent, where a reporter claims a qualified privilege as to "confidential sources," have been drawn in question as repugnant to the federal First Amendment rights of media defendants, and 2) defendant has specially set up and claimed rights, privileges, and immunities purportedly held under the federal First Amendment, See *Michigan v. Long*, __ U.S. __ 103 S.Ct. 3469 (1983).

STATEMENT OF THE CASE

This defamatory action was filed on November 12, 1982 by the black Chief Administrative Officer of the City of New Orleans, Reynard Rochon. The suit resulted from newscasts which were aired by the defendants on or about November 1, 1982. The newscasts singled out plaintiff and

other black officials as "targets" of a federal Grand Jury investigation which was probing "extortion" and "shake downs" by public officials.

While it is true that the plaintiff refused to comment on the nature of the Grand Jury investigation, he and the U.S. Attorney always denied that he was anything other than a witness participating in the Grand Jury proceedings. Despite notice of the U.S. Attorney's position, defendants republished their libel.

Defendants answered plaintiff's suit alleging truth, good faith and privilege as a defense under the federal First Amendment.

There has been no discovery except for a partial return on plaintiff's Subpoena Duces Tecum. Plaintiff attempted to immediately hold depositions but his Subpoena was quashed. Consequently, no depositions of the defendants or defendants alleged source has been taken. On December 6, 1982, less than a month after the filing of plaintiff's petition, defendants' moved for Summary Judgment. Since defendants claimed a qualified reporter's privilege, plaintiff raised the issues of his right to discovery and the partial burden of proof shift required by Louisiana law, to which defendants raised federal First Amendment defenses.

Following argument of counsel and the submission of exhibits and affidavits, but without discovery, the trial court, in oral reasons assigned from the bench, indicated that "There are issues of fact present here which would necessarily preclude the granting of summary judgment." On that same date, the court signed a judgment denying Summary Judgment; thereafter, on December 30, 1982, the

defendants sought supervisory writs and a stay order from the Fourth Circuit Court of Appeal, and the trial court stayed proceedings, including discovery, pending the review by the appellate court. Therefore, plaintiff was still unable to hold depositions.

The Fourth Circuit Court of Appeal granted defendants Supervisory Writs and on January 18, 1983, after briefing in which all federal questions now raised in this Court were raised, ruled that the trial judge had erred by denying defendants' Motion for Summary Judgment and ordered the case remanded. 427 So.2d 495, citing federal First Amendment case law. As a result thereof, plaintiff perfected a Petition for Writs to the Louisiana Supreme Court, raising all federal issues. Writs were denied. 430 So.2d 70.

After remand to the Civil District Court, plaintiff once again sought to execute discovery, citing the United States Supreme Court case of *Herbert v. Lando*. Defendants once again invoked the supervisory jurisdiction of the Louisiana intermediate court; and on August 30, 1983, summary judgment dismissing plaintiff's case was rendered in the trial court. Plaintiff appealed of right.

The media defendants moved for a dismissal of the appeal, and on January 9, 1984, the Court of Appeal affirmed and dismissed. On March 16, 1984, by a vote of four justices to three, the Louisiana Supreme Court, after thorough briefing on all federal issues, denied writs.

ARGUMENT

I. SUMMARY

The courts have anciently and consistently recognized

that the impairment of a man's interest in his good reputation by defematory falsehoods is a serious injury, compensable in damages. More recently, the courts, zealous to protect both legitimate reputational interest and the constitutionally-enshrined freedom of expression, have fashioned—through *New York Times Co. v. Sullivan*, 376 U.S. 254, and its progeny—a delicate and complex mechanism designed to achieve a balance between these competing interests.

The Summary judgment rendered in the case at bar disturbs the delicate balance attained by all prior jurisprudence by an innovation which has thrown all weight on the First Amendment side of the scale. The previously established balance required only that a defemation plaintiff in a First Amendment case defeat a Motion for Summary Judgment by making a preliminary showing, by clear and convincing evidence, that there existed a genuine issue of material fact as to falsity and "actual malice"; the previous balance also allowed a defamation plaintiff to have discovery into evidence as to the knowledge, state of mind and editorial processes of the perpetrator of falsehoods. But in the instant case the plaintiff, having been denied such discovery but having nonetheless gone on with one hand tied behind him to prove with convincing clarity that the facts of truth and malice were genuinely at issue, has been summarily dismissed because he failed to *prove* the merits of his case at trial of a preliminary Summary Motion.

Libelers and slanderers do not ordinarily broadcast the details of their "actual malice" to the world. The practical effect of a rule which requires a plaintiff to *prove* his case fully on a Summary Judgment Motion, and denies him discovery until after he has done so, is that most defamed

plaintiffs will be denied their day in court and that damage to reputation will be reduced to *injuria absque damnum.*

Due process for plaintiffs must be accorded as great a weight as freedom of expression in our over-all constitutional scheme and requires that the Summary Judgment in this case be reversed in light of the following propositions of law:

First, the plaintiff in a First Amendment case, in order to defeat a Motion for Summary Judgment, must carry the extraordinary burden of proving, by an initial showing of convincing clarity, that there is a *genuine issue* of material fact as to the falsity of the defamatory statements and as to the "actual malice" of the defendant. He is *not* required to *prove* or "make out" his case on its merits—the First Amendment requires only that he make out a prima facie case the facts of which are genuinely at issue.

Second, a plaintiff in a Louisiana libel case, even where First Amendment defenses are raised, is entitled to the benefit of the provisions of La. R.S. 45:1454. This statute provides that if a reporter who is a defamation defendant defends that he acted in good faith in reliance on "a confidential source" and claims the conditional privilege against disclosure of the source granted by R.S. 45:1452, then the reporter shall have the burden of proving his defense. The qualified constitutional immunity granted the press by the First Amendment should not prevent the application of Section 1454 to require that a reporter who refuses to divulge the identity of an alleged secret source or to allow discovery into his conduct vis-a-vis the source must bear the burden of proving—*not* the *ultimate* "fact" of his good faith or lack of "actual malice"—but the

intermediate fact that the undisclosed source does in fact exist and was in fact so reliable that this information was not, under the circumstances, inherently unreliable.

Third, a proper balancing of the constitutional right of plaintiff to access to the courts and defendants' First Amendment rights requires that a defamation plaintiff opposing an early Motion for Summary Judgment be allowed a reasonable time and opportunity to make discovery by depositions and otherwise, into the conduct, state of mind, and editorial processes of the defamation defendant; for such discovery is not prohibited by the First Amendment, *Herbert v. Lando,* 441 U.S. 153, 99 S.Ct. 1635, L.Ed.2d (1979), but is a practical necessity to insure the right to an adequate remedy for defamed plaintiffs.

The foregoing three propositions are discussed in detail with reference to the facts of this case in the three sections below. Their rejection by the Louisiana appellate courts warrants review by certiorari of this High Court under Rule 17, inasmuch as the Supreme Court of Louisiana has let stand a reported appellate decision in conflict with the decisions of the Court of Appeals and of this Court.

II. THE BURDEN OF PROOF OF THE LIBEL PLAINTIFF OPPOSING SUMMARY JUDGMENT.

The summary judgment herein was based on an erroneous statement of the burden of proof to be carried by a defamation plaintiff in a first amendment case. The first amendment as interpreted by this Court and the federal Courts of Appeal, requires only that a plaintiff opposing a motion for summary judgment establish a *prima facie* case by showing with convincing clarity that there is a genuine

factual dispute as to falsity and "actual malice" and that proof at trial of plaintiff's version of the disputed facts will entitle plaintiff to judgment. The first amendment does not require that plaintiff prove falsity and actual malice as though trial of the summary procedure were trial on the merits.

In considering the proper burden of proof to be borne by a defamation plaintiff opposing a Motion for Summary Judgment in a First Amendment case, it is well to keep in mind the general Louisiana rules of Summary Judgment from which the First Amendment calls for extraordinary derogation. In the ordinary case, Summary Judgment is looked upon with disfavor. Summary Judgment should be granted only if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits show no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. Art. 966. Papers supporting the position of the party moving for Summary Judgment are to be closely scrutinized, while the opposing papers are to be indulgently treated. *Vermilion Corp. v. Vaughn*, 397 So.2d 490 (La. 1981). A Summary Judgment is not appropriate when it is based upon affidavits and accompanying pleadings and other documentary evidence to establish subjective facts such as motive, intent, good faith or knowledge. *Mecom v. Mobil Oil Corp.*, 299 So.2d 380 (La. App. 3rd Cir. 1974), writ. ref. 302 So.2d 308 (La. 1974). Only when reasonable minds must inevitably concur is a summary judgment warranted and any doubts should be resolved in favor of a trial on the merits. *Cates v. Beauregard Elect. Coop., Inc.*, 328 So.2d 367 (La. 1976). Moreover, "the courts have repeatedly held that a motion for summary judgment is not a substitute for a trial on the merits." *State Farm Fire and Casualty Company v. Sentry Indemnity Company*, 316 So.2d 185 (La.

App. 3d Cir. 1975). In determining the genuineness of the issue, the courts are not permitted to consider the merits of the fact at issue, the credibility of witnesses, or whether the party who is alleging the fact will be able to sustain the burden of proving it. *Fly v. Hand*, 376 So.2d 1016 (La. App. 1st Cir. 1979). In altering these constant rules to protect the press, the courts should be careful not to chuck the baby out with the bath water, bearing in mind that *New York Times Co.*, and its progeny did not aim at exalting free expression absolutely over every other species of right. Rather these cases sought an "accommodation" or balance between the public's interest in an uninhibited press and the public's equally compelling need for judicial redress of libelous utterances. *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1975). In elaborating on the mechanism for achieving this constitutional balance, the courts should not devise rules which substantially depreciate a plaintiff's reputational interest without any convincing assurance that such a sacrifice is required under the First Amendment. *Id.* B. With these considerations in mind, what approach does the First Amendment require a court to take to a Motion for Summary Judgment in a public figure libel suit?

This Supreme Court has touched upon the margins of this question in at least two cases. *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) at 443 U.S. 120, footnote 9; *Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979) at 443 U.S. 161, footnote 3. The Federal Courts of Appeals have drawn appropriate inferences from these hints of the High Court. The discussion of this question by the United States Court of Appeals for the Second Circuit in *Yiamouyiannis v. Consumers Union of the United States*, 619 F.2d 932 (U.S.C.A. 2d Cir. 1980) U.S. cert. den. 339

U.S. 839, is worthy of extensive quotation, since it elucidates the history of the federal case law:

> "Appellant's principal claim on appeal is that the district court erred in granting summary judgment because it thought, erroneously, that in libel cases summary judgment " 'may well be the "rule" rather than the "exception." ' " District Court Opinion at 2 (quoting *Oliver v. Village Voice, Inc.*, 417 F.Supp. 235, 237 (S.D.N.Y. 1976), which in turn quoted *Guitar v. Westinghouse Electric Cor.*, 396 F.Supp. 1042, 1053 (S.D. N.Y. 1975), aff'd mem., 538 F.2d 309 (2d Cir. 1976). While this view of the district court had considerable support in the case at the time it was expressed, e.g., *Treutler v. Meredity Corp.*, 455 F.2d 255, 257 n.1 (8th Cir. 1972); *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32, 34-35, 365 F.2d 965, 967-68 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967), footnotes in the recent *Hutchinson* and *Wolston* cases in the Supreme Court raise serious doubt as to the continued legal viability of the proposition, expressed in *Keogh*, that "[t]he threat of being put to the defense of a lawsuit...may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Id.* at 968. Footnote 9 of the Chief Justice's opinion in *Hutchinson* not only states "doubt" about the supposed "rule" (supporting summary judgment), but takes almost the opposite position:
>
> > Considering the naunces of the issues raised here, we are constrained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and does not readily lend

> itself to summary disposition. See 10 Wright & Miller, Federal Practice and Procedure § 2730, at 590-592. Cf. *Herbert v. Lando,* 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

443 U.S. at 120 n.9, 99 S.Ct. at 2680 n.9 *Wolston* refers to this footnote, but again does not reach the question. 443 U.S. at 161 n.3, 99 S.Ct. at 2704 n.3. And at least one appellate court has already said that "the same principles applicable to normal summary judgment motions are applicable to such motions when made in a public figure libel action". *Nader v. de Toledano,* 408 A.2d 31, 50 (D.C. 1979), cert. denied, __ U.S. __, 100 S.Ct. 1028, 62 L.Ed.2d 761 (1980).

Until more directly advised, we think that this neutral approach correctly states the rule as it is presently in force: neither grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedural purposes, such as discovery, see *Herbert v. Lando,* 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), or for summary judgment, to be treated no differently from other actions; any "chilling effect" caused by the defense of a lawsuit itself, see *Herbert v. Lando,* 568 F.2d 974, 980 (2d Cir. 1977) (Kaufman, C.J., for the court), rev'd, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Id.* at 993-94 (Oakes, J., concurring); *Washington Post Co. v. Keogh, supra,* 365 F.2d at 968, is simply to be disregarded, to have no force and effect." *Id.* at 939, 940.

The United States Court of Appeals for the Fifth

Circuit, after similar glances backward, arrived at the same result, and went on, in *Rebozo v. Washington Post Co., Inc.*, 637 F.2d 375 (U.S.C.A. 5th Cir. 1981), U.S. cert. den. 454 U.S. 964, to specify a precise standard for libel-First Amendment Summary Judgments:

> "Laying aside the suggestion that the potential chilling effect of the burdens of litigation are in and of themselves grounds for preferring summary judgment, an idea repudiated by *Herbert v. Lando*, the cases in this Circuit can be reconciled. These cases stand for the principle that the standard of review in First Amendment defamation actions, as in all summary judgment cases, is whether the record, construed in a light most favorable to the party against whom the judgment has been entered, demonstrates there are genuine issues of fact which, *if proven*, would support a jury verdict for that party. Since, however, a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing evidence, rather than by a preponderance of evidence as in most other cases, *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1258 (5th Cir. 1980), the evidence and all the inferences which can reasonably be drawn from it must meet that higher standard." *Id.* at 381 (Emphasis Supplied).

This federal case-law standard for plaintiff's burden of proof, unlike the impossible burden improvidently enunciated by the Louisiana Courts, 427 So.2d 495, (that the plaintiff actually *prove* his case) strikes a reasonable balance between a defendant's First Amendment rights and a defamed plaintiff's right to an appropriate remedy.

The Court below held:

> "...[B]ecause of the possibility that the threat of litigation would create a "chilling" effect on freedom of the press,[6] the Louisiana Supreme Court has ruled that a plaintiff such as applicant *must show malice* to defeat summary judgment. *Schaefer v. Lynch*, 406 So.2d 185, 187 (La. 1981); *Duvalle v. Lake Kenilworth, Inc.*, 396 So.2d 1268 (La. 1981); *Mashburn v. Collin*, 355 So.2d 879 (La. 1977)...Plaintiff has failed to prove that there is a genuine issue of material fact and *that he is entitled to judgment as a matter of law in that he has not shown that the reports were: (1) false, and (2) that defendants either knew that the statements contained in its news reports were false or acted with reckless disregard of the truth.* 427 So.2d 495, 496. (Emphasis Added)

In effect, this opinion asserts, in direct conflict with all the subtle and intricate phraseology of the federal jurisprudence on the subject, that a First Amendment plaintiff opposing a Motion for Summary Judgment must totally prove his case at trial of the motion as though he were proving it at trial on the merits. This standard of proof in a Summary Judgment proceeding is totally unprecedented in and unwarranted by prior law.

When true standard for assessing evidence is applied, one is compelled to reach the inescapable conclusion that the various affidavits and exhibits submitted by the plaintiff in this case clearly discloses that a judge or jury could reasonably find the defendants either knew plaintiff was not a subject of an investigation being conducted by a Federal Grand Jury or acted with reckless disregard of this knowledge. The pleadings, affidavits and exhibits of plaintiff show that he maintained that he was merely a witness in the Federal Grand Jury proceedings which took place on November 1, 1982. The defendants indicated that

he was the subject of a Federal Grand Jury investigation which was probing "extortion" and looking at public officials who "have tried to enrich themselves by shaking down businessmen whose real estate deals and other transactions require City Hall approval." Plaintiff was singled out as one of the public officials "being looked at". Simply put, this allegation is *untrue* and defamatory. Plaintiff acknowledged being invited to participate in the Grand Jury proceedings as a witness but, as this Honorable Court is well aware, this role is a far cry from being a subject of a Grand Jury investigation. In his Opposition to the Summary Judgment, plaintiff pointed out and substantiated the following facts:

Item One: Plaintiff received a letter from U.S. Attorney, John Volz, inviting him to participate in the Grand Jury proceedings as a *witness.*

Item Two: Appellants were aware of this letter *before* the newscasts.

Item Three: Plaintiff spoke with U.S. Attorney, John Volz, on October 29, 1982 prior to testifying before the Grand Jury on November 1, 1982. During this conversation, Mr. Volz confirmed the fact that plaintiff was not a target, subject or suspect of the Grand Jury investigation. Appellants were made aware of this conversation.

Item Four: The plaintiff denied ever being a subject of the Grand Jury investigation.

Item Five: John Bender, Director of Public Information for the City of New Orleans spoke to the appellants prior to the newscasts and had indicated that plaintiff was a witness in the Grand Jury investigation.

Item Six: Plaintiff had personally informed appellant-reporter, Dennis Wolter, of his conversation with John Volz wherein the U.S. Attorney had told him he was not a target, subject or suspect of the Grand Jury investigation.

Item Seven: Nonetheless, defendants in a re-airing of their defamatory falsehoods, alleged falsely that they had had no comment from the alleged "targets."

Item Eight: The appellants never once verified in their affidavit that a so-called reliable source informed them that plaintiff was singled out as the subject of a Grand Jury investigation.

Item Nine: The appellants failed to verify by a phone call to U.S. Attorney, John Volz, or in any other manner, the information allegedly received by a so-called reliable source.

It is obvious that the trial judge, on first hearing before remand, weighed the aforementioned facts in concluding that a genuine issue of fact existed. It is equally obvious that the trial judge concluded that these facts, taken *in toto*, constituted strong evidence of actual malice. Consequently, the lower court appropriately ruled that plaintiff had met his burden, as that burden is accurately described by the totality of federal jurisprudence.

The plaintiff made a clear and convincing showing of evidence from which, viewed in the light most favorable to plaintiff, a judge or jury at trial on the merits could reasonably conclude that defendant acted with reckless disregard of the truth is further shown by the Republication Rule.

The federal Fifth Circuit Court of Appeals has succinctly defined the republication rule:

> Where a person has published a false statement and information thereafter comes to him from a reliable source which would put a reasonable person on inquiry as to the truth of such statement, the repetition of the defamation is *strong evidence of malice. Diplomat Electric, Inc. v. Westinghouse Electric Sup. Co.*, 430 F.2d 38, 47 (5th Cir. 1970). (Emphasis Added).

See also Morgan v. Dunn and Bradstreet, Inc., 421 F.2d 1241, 1242-43 (5th Cir. 1970) (The subsequent publication of a libel with knowledge of its falsity is *proof of malice*).

The case *sub judice* is concerned with at least three newscasts. Plaintiff avers that the republication of the defamatory words on the 10:00 P.M. newscast, *after* plaintiff had talked to Reporter Dennis Wolter and specifically and unequivocally denied being the subject of a Federal Grand Jury investigation constitutes either proof of malice or strong evidence of malice.

The defendants are shown by the record to have perpetrated at least one defamatory falsehood with direct, personal knowledge of its falsity; in republications of the original defamations, the defendants falsely stated that they had received no comments in response to the charges. In light of the communication between plaintiff and defendant after the initial broadcast, defendants cannot disavow knowledge of this libel. Nor can there be any doubt that the statement that a public official has refused to comment on charges or insinuations of criminality is damaging and defamatory.

III. THE SHIFTING OF THE BURDEN OF PROOF BY THE "CONFIDENTIAL SOURCE" RULE OF R.S. 45:1454.

The summary judgment herein was in error in that the Court failed to apply La. R.S. 45:1452 and 45:1454 so as to require the defendants, who claimed the conditional reporter's privilege as to "Confidential Sources" upon whom he relied, to bear the shifted burden of proving the intermediate fact that such source existed and was not inherently unreliable under the circumstances.

LSA-R.S. 45:1452 declares:

> Except as hereinafter provided, no reporter shall be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter. (Emphasis Added)

The defendants claimed this conditional privilege and would in the ordinary case, be placed in the posture of proving their good faith or lack of malice. LSA-R.S. 45:1454 is quite clear on this point and reads as follows:

> If the privilege granted herein is claimed and if, in a suit for damages for defamation, a legal defense of good faith has been asserted by a reporter or by a news media with respect to an issue upon which the reporter alleges to have obtained information from a confidential source, *the burden of proof shall be on the reporter or news media* to sustain this defense. (Emphasis Added)

In this case, the Courts below did not apply these

rules, seemingly because of the federal First Amendment, which may preclude applying the statute so totally as to shift the entire burden of proving the ultimate fact of lack of malice to the media defendants, but which will not be offended by, at least, giving the statute partial effect by requiring defendant to prove those *intermediate* facts which relate to the nature and reliability of his source and access to which he has denied plaintiff by claiming the conditional privilege granted by R.S. 45:1452.

Facts about the alleged "confidential source" close to the grand jury are crucially pertinent to the issue of "actual malice" in this case. Consider the following exposition of the meaning of "actual malice":

> "The *New York Times* actual malice standard is deceptively simple: knowing falsity or reckless disregard of the truth or falsity or reckless disregard of the truth or falsity of the defamatory statement. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 726 11 L.Ed.2d 686 (1964). See also *Garrison v. Louisiana*, 379 U.S. 64, 79, 85 S.Ct. 209, 218, 13 L.Ed.2d 125 (1964). Recklessness means that the publisher "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), or had a "subjective awareness of probable falsity." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6, 94 S.Ct. 2997, 3005 n.6, 41 L.Ed.2d 789 (1974). This standard makes it "essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant." *Herbert v. Lando*, 441 U.S. 153, 160, 99 S.Ct. 1635, 1640, 60 L.Ed.2d 115 (1979). Although a publisher does not have an absolute duty to investigate, *St. Amant v. Thompson*, 390 U.S. 727, 733, 88 S.Ct. 1323, 1326, 20 L.Ed.2d

> (1969), a publisher cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements. A publisher cannot automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive,...when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.
>
> *St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (footnote omitted) (emphasis added). See also *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 169-70, 87 S.Ct. 1975, 1998-1999, 18 L.Ed.2d 1094 (1967) (Warren, C.J. concurring); *Carson v. Allied News Co.,* 529 F.2d 206, 211 (7th Cir. 1976); *Grzelak v. Calumet Publishing Co.,* 543 F.2d 107 (7th Cir.) cert. denied, 434 U.S. 966, 98 S.Ct. 508, 54 L.Ed.2d 452 (1977)." *Gertz v. Robt Welch, Inc.,* 680 F.2d 527 at 537, 538 (U.S.C.A. 7th Cir. 1982).

The identity, veracity, and accuracy of the alleged source in this case are crucial to a determination whether defendants acted in reckless disregard of the truth when they published the source's information despite the fact that the U.S. Attorney's letter made the information inherently improbable and despite the fact the informer, if any, was by his very "disclosures" evincing moral turpitude by purporting to divulge grand-jury secrets. In a state without a reporter's privilege statute, in a case where

facts relating to a secret informer are essential to the malice question in a defamation action, defendants could be compelled to disclose the identity of their alleged source. See *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (U.S.C.A. 5th Cir. 1980).

A fortiori since Louisiana has expanded First Amendment protections by enacting R.S. 45:1451 et seq. which allows a reporter to resist disclosure at the price of proving his lack of malice vis-a-vis that source, the First Amendment which does not prevent compelled disclosure in the first place, will not prevent the exaction of the statutory price for invoking this extraordinary privilege. That price is the shifting of the burden of proof quoad all intermediate facts concerning the informer. In other words, the qualified constitutional immunity granted press-defendants by the First Amendment should not prevent the application of Section 1454 to require that a reporter who refuses to divulge the identity of an alleged secret source or to allow discovery into his conduct vis-a-vis the source, must bear the burden of proving—*not* the *ultimate* fact of his lack of "actual malice" *in toto*—but the intermediate facts that, e.g., the alleged source does in fact exist and was in fact so reliable that his information was not, under the circumstances, inherently unreliable or improbable.

IV. HERBERT V. LANDO AND THE RIGHT TO REASONABLE DISCOVERY IN A FIRST AMENDMENT LIBEL CASE.

The summary judgment herein was erroneous in that it was based on a deficient record improperly truncated by the prohibition of *Herbert v. Lando* discovery into the conduct, state of mind, and editorial processes of defendants.

In the complexities of modern litigation, discovery is a routine and ordinary procedure; and effective discovery is a virtual pre-requisite to prevailing over one's opponent. In the instant case, plaintiff has been denied effective discovery at every turn. The pretext for this denial was a purported constitutional barrier erected by the First Amendment. But there is no aspect of the Free Expression Clauses of the First Amendment which justified the Courts abrupt and devastating truncation of plaintiff's efforts to have discovery herein.

The leading case in this area is *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). In *Herbert* a "public figure" defamation plaintiff sought an order compelling discovery, which was granted by the United States District Court. The media defendants filed an interlocutory appeal. The Court of Appeals for the Second Circuit remanded the case, 568 F.2d 974, with directions according an absolute privilege to the editorial process and prohibiting discovery into the newsmen's thoughts, opinions, and conclusions with respect to material he had gathered and into conversations between newsmen and their editorial colleagues. Writs were granted by this Supreme Court, which reversed the Court of Appeals.

The Court's opinion, referring to the *New York Times Co.* and subsequent cases, noted:

> "Nor did these cases suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action. On the contrary, *New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. To be liable, the alleged

> defamer of public officials or of public figures must know or have reason to suspect that his publication is false. In other cases proof of some kind of fault, negligence perhaps, is essential to recovery. Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination.
>
> It is also untendable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error. In *Butts*, for example, it is evident from the record that the editorial process had been subjected to close examination and that direct as well as indirect evidence was relied on to prove that the defendant magazine had acted with actual malice. The damages verdict was sustained without any suggestion that plaintiff's proof had trenched upon forbidden areas." *Id.* at 441 U.S. 162.

The Court, noting that its cases had always sought a balance between the First Amendment and "the individual's interest in his reputation...[,] also a basic concern", *id.* at 169, continued:

> "We are thus being asked to modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood by the publisher of an alleged libel, elements that are critical to plaintiffs such as *Herbert*. The case for making this modification is by no means clear and convincing, and we decline to accept it.

In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*. As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions, and conclusions of the publisher, but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquiries, which the District Court recognized and the Court of Appeals did not deny, can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity." *New York Times Co. v. Sullivan*, 376 U.S. at 285-286, 84 S.Ct., at 729." *Id.* at 170.

The Court clearly rejected the media's contention that "requiring disclosure of editorial conversations and of a reporter's conclusions about the veracity of the material he has gathered will have an intolerable chilling effect on the editorial process and editorial decision making. But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First

> Amendment credentials. "[T]here is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 340, 94 S.Ct., at 3007." *Id.* at 171.

In light of the *Herbert* opinion, it is plain that the denial of discovery to the plaintiff in the instant case was wholly improper and totally unjustified by the First Amendment. The Summary Judgment entered herein is, accordingly erroneous; for it was founded on a record emaciated by the improper preclusion of discovery.

CONCLUSION

Justice and the need to conform Reported Louisiana Law to the federal case-law plainly requires review of the summary dismissal of this cause. Plaintiff, a black official defamed throughout the City of New Orleans by publicly-broadcast falsehoods purportedly founded on unnamed sources (who, if they existed, would have been violating grand jury secrecy), filed suit under La. Const. Art. I, Section 22 to repair his good reputation. He immediately set out to commence *Herbert v. Lando* discovery into the state of mind and behind-the-scenes conduct of the defendants, but ws halted at the courthouse door by an amazing Catch-22. He could not have discovery into the evidence which might help make out his case on the merits until he jumped the hurdle of Summary Judgment; and that hurdle was to be raised to an unprecedented height.

A prima facie or preliminary showing that plaintiff had a serious (albeit disputed) case for falsity and actual malice would not suffice: plaintiff was required to prove his case as though at trial on the merits by "prov[ing]...*that he is entitled to judgment as a matter of law* in that...the

reports were..." false and actually malicious. *Rochon v. Wolter*, 427 So.2d 495, 496 (La. App. 4th Cir. 1983). In short, plaintiff was told that he could not make discovery (a virtual *sine qua non* to prevailing on the merits in today's complex litigation) until he had shown that he was entitled to judgment on the merits. In practical terms, this Catch-22 magnifies the qualified immunity of the press into an absolute immunity in cases of all but the most blatant malice, denying plaintiff, and others to follow, an "adequate remedy...for injury to him in his...reputation..." La. Const. Art. I, Section 22. His remedy was denied in the name of the First Amendment, a circumstance which warrants review by this Honorable Court.

Respectfully submitted,

MICHAEL G. BAGNERIS
ATTORNEY FOR PLAINTIFF
335 DECATUR STREET
NEW ORLEANS, LA 70130
PHONE: (504) 581-5152

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Brief on behalf of plaintiff have been forwarded to all opposing counsel by depositing same in the United States Mail, postage prepaid, this ____ day of June, 1984.

MICHAEL G. BAGNERIS

APPENDIX "A"

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

LSA-R.S. 45:1452

§ 1452. Conditional privilege from compulsory disclosure of informant or source

Except as hereinafter provided, no reported shall be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter.

LSA-R.S. 45:1454

§ 1454. Defamation; burden of proof

If the privilege granted herein is claimed and if, in a suit for damages for defamation, a legal defense of good faith has been asserted by a reporter or by a news media with respect to an issue upon which the reporter alleges to have obtained information from a confidential source, the burden of proof shall be on the reporter or news media to sustain this defense.

APPENDIX "B"

THE SUPREME COURT
OF THE STATE OF LOUISIANA

No. 84-C-0277

REYNARD JOHN ROCHON, SR.

VS.

DENNIS WOLTER, JIM BOYER, WWL-TV, CHANNEL 4, LOYOLA UNIVERSITY AND UNKNOWN INSURANCE COMPANY

In Re: Reynard John Rochon, Sr., applying for Writ of Certiorari and/or Review to the Fourth Circuit Court of Appeal, Number CA-1497; Civil District Court, Parish of Orleans, Number 82-17667.

March 16, 1984

Denied.

WFM
FAB
JCW
HTL

DIXON, C.J., CALOGERO & DENNIS, J.J., would grant the writ.

Supreme Court of Louisiana
March 16, 1984

/S/ Signed
Clerk of Court
For the Court

APPENDIX "C"

NO. CA-1497
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

REYNARD J. ROCHON

VERSUS

DENNIS WOLTER, ET ALS

ORDER

This court is not required to review its prior rulings in the same case involving the same parties. *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 260 La. 325, 256 So.2d 105 (1971); *American Emp. Ins. v. Honeycutt Furniture Co.*, 390 So.2d 255 (La. App. 3d Cir. 1980). Because this appeal is based entirely on issues previously decided by this court, we need not reconsider our previous rulings. *See Rochon v. Wolter*, 427 So.2d 495 (La. App. 4th Cir. 1983).

IT IS ORDERED that plaintiff-appellant's appeal is hereby dismissed, all costs to appellant.

New Orleans, Louisiana, this 19th day of January, 1984.

/S/ Signed
JUDGE DAVID R. M. WILLIAMS

/S/ Signed
JUDGE ISRAEL M. AUGUSTINE

/S/ Signed
JUDGE ROBERT L. LOBRANO

APPENDIX "D"

STATE OF LOUISIANA
NO. 82-17667
DIVISION "I"
DOCKET NO. 4

REYNAD JOHN ROCHON, SR.

VERSUS

DENNIS WOLTER, JIM BOYER, WWL-TV, CHANNEL 4, LOYOLA UNIVERSITY AND UNKNOWN INSURANCE COMPANY

FILED: AUG 30, 1983,
DEPUTY CLERK, CIVIL DISTRICT COURT

JUDGMENT

In accordance with the decision rendered by the Fourth Circuit Court of Appeal on June 7, 1983;

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed herein on behalf of Loyola University, Dennis Wolter and Jim Boyer be and the same is hereby granted.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 30 day of August, 1983.

/S/ Signed
JUDGE

APPENDIX "E"

NO. C0954
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

REYNARD JOHN ROCHON, SR.

V.

DENNIS WOLTER, JIM BOYER, WWL-TV, CHANNEL 4, LOYOLA UNIVERSITY AND UNKNOWN INSURANCE COMPANY

IN RE: DENNIS WOLTER, JIM BOYER, AND LOYOLA UNIVERSITY

APPLYING FOR: SUPERVISORY WRITS OF MANDAMUS AND/OR PROHIBITION

DIRECTED TO: HONORABLE JOSEPH V. DIROSA, JUDGE, CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION "L", NO. 82-17667

The court has considered the application for wris and the response thereto.

By judgment and decision of this Court rendered January 18, 1983, (reported at 427 So.2d 495), the Court ordered the case remanded to the District Court for entry of summary judgment in defendants' favor. The plaintiff-respondent subsequently applied for writs to the Louisiana Supreme Court, and on March 4, 1983, the Supreme Court denied writs. Plaintiff has not sought re-hearing before the Supreme Court, and the judgment of this Court is therefore now a final judgment subject to execution.

We find the trial court's show cause order of May 17, 1983 inconsistent with this court's order of January 18, 1983 and accordingly:

IT IS THEREFORE, ORDERED, that a Writ of Mandamus issue to the Honorable Joseph V. Di Rosa, Judge, Division "L", Civil District Court for the Parish of Orleans, mandating and ordering him to enter a judgment of dismissal of these proceedings in accordance with the decree and mandate of this court forthewith.

New Orleans, Louisiana

June 7, 1983

/S/ Signed
JUDGE ROBERT J. KLEES

/S/ Signed
JUDGE JAMES C. GULOTTA

/S/ Signed
JUDGE JIM GARRISON

APPENDIX "F"

THE SUPREME COURT
OF THE STATE OF LOUISIANA

No. 83-CC-0215

REYNARD JOHN ROCHON, SR.

VS.

DENNIS WOLTER, JIM BOYER, WWL-TV, CHANNEL 4, LOYOLA UNIVERSITY AND UNKNOWN INSURANCE COMPANY

In Re: Reynard John Rochon, Sr., applying for Supervisory Writ and/or Writ of Review to the Civil District Court, Number 82-17667; Court of Appeal, Fourth Circuit Orleans Parish, Number C-0475.

March 4, 1983

Denied. Result correct.

JAD
WFM
FAB
JCW
HTL

CALOGERO & DENNIS, J.J., would grant the writ.

Supreme Court of Louisiana
March 4, 1983

/S/ Signed

Clerk of Court
For the Court

APPENDIX "G"

NO. C-0475

REYNAD JOHN ROCHON, SR.

VERSUS

DENNIS WOLTER, JIM BOYER, WWL-TV, CHANNEL 4, LOYOLA UNIVERSITY AND UNKNOWN INSURANCE COMPANY

WRIT GRANTED

A plaintiff in a libel action who is a public figure must prove that the damaging statements were (1) false and (2) made with malice, *i.e.*, published with the knowledge that they were false or with reckless disregard of the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Summary judgment is granted only when there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La.C.C.Pr. art. 966. Although the burden of proof is usually on the moving party, because of the possibility that the threat of litigation would create a "chilling" effect on freedom of the press, the Louisiana Supreme Court has ruled that a plaintiff such as applicant must show malice to defeat summary judgment. *Schaefer v. Lynch*, 406 So.2d 185, 187 (La. 1981); *Duvalle v. Lake Kenilworth, Inc.*, 396 So.2d 1268 (La. 1981); *Mashburn v. Collin*, 355 So.2d 879 (La. 1977). The burden placed on plaintiffs in First Amendment cases is exceedingly stringent because of the importance our Founding Fathers attached to freedom of the press as essential to a strong democracy.

Plaintiff has failed to prove that there is a genuine issue of material fact and that he is entitled to judgment as a matter of law in that he has not shown that the reports were: (1) false, and (2) that defendants either knew that the statements contained in its news reports were false or acted with reckless disregard of the truth.

For these reasons, summary judgment should have been granted. This case is remanded for entry of summary judgment in defendants' favor.

NEW ORLEANS, LOUISIANA
this 18th day of January, 1983.

/S/ Signed
JUDGE DAVID R. M. WILLIAMS

/S/ Signed
JUDGE ROBERT L. LOBRANO

/S/ Signed
JUDGE G. WILLIAM SWIFT, JR.

APPENDIX "H"

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 82-17667 DIVISION "L" DOCKET 4

REYNARD JOHN ROCHON, SR.

VS.

DENNIS WOLTERS, ET ALS.

JUDGMENT

The motion for summary judgment filed herein came on this day for trial.

PRESENT:
MICHAEL G. BAGNERIS, Attorney for plaintiff
THOMAS A. RAYER, Attorney for respondants

After hearing the pleadings and argument of Counsel:

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment filed herein on behalf of Loyola University, Dennis Wolter, and Jim Boyer, be and the same is denied.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT THIS 17TH DAY OF DECEMBER, 1982.

/S/ Signed
JUDGE